2006

State of Utah v. Darren Neil Greuber, Jr : Brief of Respondent

Utah Court of Appeals

Matthew D. Bates; Attorney General's Office; Attorney for the State.
Jennifer Gowans; Fillmore Spencer, LLC; Attorneys for Mr. Greuber.

IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Respondent, vs. DARREN NEIL GREUBER, JR., Defendant/Petitioner.	Case No. 20060009-SC

BRIEF OF RESPONDENT

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

JENNIFER GOWANS
Fillmore Spencer, LLC
3301 North University Ave.
Provo, Utah 84604

Counsel for Petitioner

MATTHEW D. BATES (9861)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

VINCENT B. MEISTER
Deputy Salt Lake County District Attorney

Counsel for Respondent

IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Respondent, vs. DARREN NEIL GREUBER, JR., Defendant/Petitioner.	Case No. 20060009-SC

BRIEF OF RESPONDENT

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

JENNIFER GOWANS
Fillmore Spencer, LLC
3301 North University Ave.
Provo, Utah 84604

Counsel for Petitioner

MATTHEW D. BATES (9861)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

VINCENT B. MEISTER
Deputy Salt Lake County District Attorney

Counsel for Respondent

TABLE OF CONTENTS

ADDENDA

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Respondent, vs. DARREN NEIL GREUBER, JR., Defendant/Petitioner.	Case No. 20060009-SC

BRIEF OF RESPONDENT

* * *

STATEMENT OF JURISDICTION

This case is before the Court on a writ of certiorari to the Utah Court of Appeals. The Supreme Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(5) (West 2004).

STATEMENT OF THE ISSUES

ISSUE 1

An error by counsel warrants setting aside a criminal judgment only when it affects the outcome of the proceedings *and* deprives the defendant of a substantive or procedural right. Defendant claims that but for his counsel's alleged error, he would have accepted a plea bargain. Was defendant deprived of a substantive or procedural right?

ISSUE 2

Did the trial court clearly err in finding that defendant would not have accepted a plea bargain, where there was no bargain to accept and both of defendant's attorneys testified that he would not have pled guilty to murder?

Standards of Review. On certiorari review, this Court must determine whether the court of appeals accurately reviewed the trial court's decision under the appropriate standard of review. *See State v. Orr*, 2005 UT 92, ¶ 7, 127 P.3d 1213. Where a trial court has taken evidence on an ineffective assistance of counsel claim, the claim presents a mixed question of fact and law to the appellate court. *See State v. Tyler*, 850 P.2d 1250, 1253 (Utah 1993). The appellate court reviews the trial court's factual findings for clear error and any legal conclusion for correctness. *Id.*; Utah R. App. P. 23B(g) ("The findings of fact entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals.")

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS

On October 30, 2001, the State charged defendant by information with one count of murder and one count of aggravated kidnapping (R. 4A-4C, 116-18). A jury convicted defendant as charged (R. 160-61; 232:84). The court sentenced defendant to consecutive prison terms of five years to life and fifteen years to life (R. 190-91). Defendant filed a timely notice of appeal to this Court (R. 209). This Court transferred the case to the court of appeals pursuant to Utah Code Ann. § 78-2-2(4) (West 2004) (R. 228).

In that court, defendant claimed ineffective assistance of counsel. Br. Aplt. at 19-22. He did not claim, however, that his counsel's alleged deficiency prejudiced his right to a fair trial. Br. Aplt. at 20. Rather, he claimed that counsel's conduct denied him a fair opportunity to accept a plea bargain from the State. Br. Aplt. at 21-22. He also claimed that the trial court had made a clearly erroneous factual finding during a rule 23B remand from the court of appeals. Br. Aplt. at 22-24.

The court of appeals affirmed defendant's conviction. It first ruled that under this Court's decisions in *State v. Geary* and *State v. Knight*, defendant had no right to a plea bargain. *See State v. Grueber*, 2005 UT App 480U, ¶¶ 4-5. Consequently, defendant's loss of a fair opportunity to accept a plea offer did not constitute

prejudice. *Id.* The court also held that the challenged factual finding was supported by the record. *Id.* at 6–7.

This Court granted defendant's petition for a writ of certiorari.

SUMMARY OF FACTS

On the evening of October 9, 2001, defendant and several members of the Silent Aryan Warriors (S.A.W.) kidnapped Don Dorton (R. 229:39, 48–49, 51). They covered his head and upper torso with a sheet, duct taped his wrists and ankles, and drove him to a rural area of Salt Lake County (R. 229:49, 54–55, 110; State's Ex. Nos. 3, 4, 5, 6, 7). Defendant dragged Dorton thirty feet off the road and dropped an eighty-three pound rock on his head (R. 229:56, 59, 62-63, 114; 230:107). The rock crushed Dorton's skull, killing him (229:116, 124–25, 141).

The State charged defendant with one count of murder and one count of aggravated kidnapping (R. 4A–4C, 116–18). At the first roll call, on November 13, 2001, the State made an oral plea offer of one count of murder in exchange for dropping the aggravated kidnapping charge (R. 452; 458:60–61). Defense counsel conveyed the plea offer to defendant, who quickly rejected it because he did not want to plead guilty to murder (R. 453; 458:14, 27, 41–42, 64, 76). Defendant understood from his attorneys that the murder charge would ultimately set the amount of time the Board of Pardons kept him in prison (R. 453; 458:14–15, 41–42, 76). He and his attorneys concluded that "the marginal cost . . . of the aggravated

kidnapping count wasn't worth consideration, because [defendant] would still be talking about at least 20 years" (R. 453; 458:42). Moreover, defendant maintained his innocence of the crime, and "the difference between being convicted of one count and being convicted of both counts wasn't enough to cause him to plead guilty to something that he didn't do" (R. 458:15–16, 42). Trial counsel thus determined that it was fruitless to approach defendant with any plea deals that involved pleading to murder (R. 458:45).

Defendant and his attorneys believed that they had a viable defense based on the impeachability of the State's witnesses (R. 458:6, 28–29). The State had no physical evidence connecting defendant to the murder (R. 229:23–24). Rather, its case consisted of the testimony of co-defendants, who were drug addicts and members of S.A.W. (R. 229:23–24; 453; 458:6, 28). The State also had a jailhouse informant, David Corcoran, to whom defendant had confessed while incarcerated in the Davis County Jail (R. 229:16; 230:70–72; 454; 458:6–7). Defendant told his attorneys that he did not confess to Corcoran, but that Corcoran had learned the facts of the kidnapping and murder either by reading defendant's discovery or by speaking with Larry Rasmussen, a S.A.W. leader and co-defendant in the case (R. 454–55; 458:7, 14). Defendant gave his counsel the name of an inmate, Floyd McCallister, who would testify that Corcoran had told him that he read defendant's discovery (R. 458:13–14, 50–51). Defendant did not tell his counsel, however, that

Corcoran was transferred out of his cell and had no further contact with defendant before defendant received his discovery (R. 455; 458:51-52).

Before trial, in response to defendant's discovery request, the State disclosed the existence of several recordings of defendant's telephone calls from jail (R. 38, 453). Defendant's trial counsel did not request or listen to the recordings of defendant's telephone calls before trial (R. 454; 458:35-36). In some of the phone calls that were made after Corcoran had been transferred out of defendant's cell, defendant stated that he had not yet received his discovery (R. 455; 458:8, 47, 77).

On the first day of trial, in opening statements, defense counsel pointed out that the State had no physical evidence connecting defendant to Dorton's death (R. 229:23-24). Counsel added that the State's entire case hinged on the testimony of a few methamphetamine addicts who were affiliated with S.A.W. (R. 229:23). Counsel did not intimate, however, what evidence defendant would present or whether defendant would testify (R. 229:19-26).

The State's presentation of evidence included testimony from defendant's cellmate, David Corcoran, that defendant had confessed while in jail (R. 230:68, 71-75). Corcoran also testified that defendant had asked him to help arrange an alibi (R. 230:77-78). When Corcoran was transferred to another section of the jail, defendant gave him two letters, which the State presented at trial, instructing

Corcoran to contact defendant's cousin and ask her to arrange an alibi for defendant (R. 230:78, 82–83; State's Ex. Nos. 18C, 18D).

After the State rested, defendant recalled the State's case manager, Courtney Nelson (R. 231:81, 86–87). Following Nelson's testimony, defense counsel told the court, in the presence of the jury, that he intended to call two more witnesses: Floyd McCallister and defendant (R. 231:115). The court called a recess so that defense counsel could have Mr. McCallister transported from the jail (R. 231:115). During the recess, defendant's trial counsel listened, at the State's suggestion, to the audio recordings of defendant's jailhouse telephone calls described in the State's Fourth Supplemental Response to Request for Discovery (R. 231:116, 120–22). Trial counsel concluded that the contents of the recordings made it impossible for "ethical or other considerations" to present testimony from either McCallister or defendant (R. 231:122). Defense counsel moved for a mistrial based on ineffective assistance of counsel and failure by the State to provide adequate discovery (R. 231:120–23). The trial court denied the mistrial motion, but offered to give a curative instruction to the jury (R. 231:128–29).

The court remained in recess until the next morning (R. 231:129). When the jury returned to the courtroom, the court explained that defendant would not present any further evidence and instructed the jury not to draw any negative inferences from defendant's decision not to present any evidence (R. 232:12–13).

The jury found defendant guilty as charged (R. 160-61; 232:84). The court sentenced defendant to consecutive prison terms for both charges, and defendant appealed (R. 190, 209; 250:16-17).

On appeal, defendant requested and was granted a remand under rule 23B, Utah Rules of Appellate Procedure, to supplement the record with findings regarding his claim of ineffective assistance of counsel (R. 261-72, 293-94). He asserted in his remand motion that counsel was deficient for not listening to the recordings before trial and that counsel's deficient performance prejudiced him because, had he known of the tapes, he would have accepted the State's plea bargain (R. 271)

At the evidentiary hearing on remand, defendant testified that if his counsel had informed him of the recordings, he would have accepted the State's plea bargain (R. 458:9). Both of his attorneys, however, testified that he would not have accepted a plea bargain even had they listened to the recordings before trial. The trial court found that "defendant would not have accepted the plea offer from the State because he did not want to plead guilty to the charge of Murder" (R. 456).

SUMMARY OF ARGUMENT

POINT I. Defendant may not predicate a claim of ineffective assistance of counsel on a lost plea bargain. The right to effective counsel exists only to protect those substantive and procedural rights guaranteed by the Sixth Amendment and

the Due Process Clause of the Fourteenth Amendment. There is neither a substantive nor a procedural right to a plea bargain.

POINT II. The trial court's finding that defendant would not have accepted a plea bargain is not clearly erroneous. Defendant unequivocally rejected the State's plea bargain almost two months before his phone calls were provided to his attorneys. Moreover, both of defendant's attorneys said that he would not have accepted a plea offer, because he did not want to plead guilty to murder. The only evidence that defendant would have accepted the plea bargain was defendant's self-serving testimony.

ARGUMENT

I. DEFENDANT HAS NO SUBSTANTIVE OR PROCEDURAL RIGHT TO A PLEA BARGAIN; THUS, LOSS OF A PLEA BARGAIN CANNOT CONSTITUTE PREJUDICE IN AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Defendant claims that the court of appeals erred in holding that his counsel was not ineffective. Br. Pet. at 12–17. Specifically, he asserts that the court incorrectly determined that a lost plea bargain does constitute prejudice under the Sixth Amendment right to counsel. Br. Pet. at 12–17. Defendant agrees that he is not entitled to a plea bargain. Br. Pet. at 12. He argues instead that any deficient performance by counsel that affects the outcome of the plea process is sufficient to establish a violation of his Sixth Amendment right to counsel. Br. Aplt. at 13–14.

Defendant's claim is foreclosed by this Court's decisions in *State v. Knight*, 734 P.2d 913, 919 n.7 (Utah 1987), and *State v. Geary*, 707 P.2d 645, 646 (Utah 1985). He thus asks this Court to overrule *Knight*. Br. Pet. at 16.[1]

A. Defendant must overcome a substantial burden of persuasion to overturn *State v. Knight*.

Under the doctrine of stare decisis, "the first decision by a court of a particular question of law governs later decisions by the same court." *State v. Menzies*, 889 P.2d 393, 399 (Utah 1994). Stare decisis is "a cornerstone of Anglo-American jurisprudence" and is "crucial to the predictability of the law and the fairness of adjudication." *Id.* Thus, "[t]hose asking [this Court] to overturn prior precedent have a substantial burden of persuasion." *Id.* at 398. To satisfy this burden, the party seeking to overturn precedent must clearly convince the Court either that (1) "the rule was originally erroneous" or (2) that the rule "is no longer sound because of changing conditions and that more good than harm will come by departing from precedent." *Id.* at 399. Defendant has done neither.

The rule defendant seeks to overturn—that the Sixth Amendment right to counsel guarantees fair trials, not plea bargains—has been in place for nearly

---

[1] Defendant does not acknowledge *Geary*. *See* Br. Pet. at ii–iv, 12–17.

twenty-one years in Utah. It was first announced in *State v. Geary* and later reaffirmed in *State v. Knight*.

Geary complained that his trial counsel in a rape trial failed to determine before trial that defendant's knife was not the knife that cut the victim's blouse. *Id.* at 646. Geary asserted that had counsel done so, it would have forced a plea bargain with the prosecutor. *Id.* This Court rejected his claim and held that his counsel's failure to secure a plea bargain was not prejudice under the Sixth Amendment right to counsel: "[Geary] loses sight of the fact that our state and federal constitutions guarantee fair trials, not plea bargains." *Id.*

Two years later, Knight claimed in his appeal from an aggravated robbery conviction that the prosecution improperly withheld contact information for some of its witnesses. *Knight*, 734 P.2d at 916. He also claimed that withholding the information caused his counsel to be ineffective in advising him to reject a plea offer. *Id.* at 919 n.7. This Court held that Knight was not denied his right to the effective assistance of counsel when he rejected the plea offer and went to trial:

> We have previously rejected claims alleging ineffective assistance of counsel when a defendant has rejected a plea bargain and has retained his or her right to a fair trial . . . "[Defendant] loses site of the fact that our state and federal constitutions guarantee fair trials, not plea bargains."

Id. (quoting *Geary*, 707 P.2d at 646) (alteration in *Knight*).

In the instant appeal, defendant does not claim that *Knight* "is no longer sound because of changing conditions and that more good than harm will come by departing from precedent." *Menzies* 889 P.2d at 399. He claims only that *Knight* was erroneously decided. Br. Pet. at 16-17 ("To the extent that *Knight* stands for the proposition that a defendant is not entitled to effective assistances of counsel during plea negotiations, it is at odds with the state and federal constitutions as interpreted by the law cited above."). But defendant has failed to show that *Knight* and *Geary* were incorrect.

B. *Knight* and *Geary* are consistent with the U.S. Supreme Court's Sixth Amendment jurisprudence.

The U.S. Supreme Court has never considered the issue this Court confronted in *Knight* and *Geary*—whether the Sixth Amendment is violated by counsel's mistakes that cause a defendant to reject a plea bargain and retain his right to a fair trial. But this Court's decisions in *Knight* and *Geary* are consistent with Court's Sixth Amendment jurisprudence.

One of the guarantees of the Sixth Amendment is the right to the assistance of counsel at all critical stages of a criminal proceeding. *See Massiah v. United States*, 377 U.S. 201, 206 (1964); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). If a defendant is denied the assistance of counsel in a critical stage of the proceeding, prejudice is presumed. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984) ("Actual

or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice"); *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.").

But where a defendant has counsel and that counsel performs deficiently, the Sixth Amendment right to counsel is violated only if the defendant was prejudiced by the deficient conduct: "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691–92. This is because "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658. In other words, the Sixth Amendment guarantees defendants a fair trial as defined by express rights promised in that Amendment. *Strickland*, 466 U.S. at 684–85. And effective counsel is necessary not because it is an express right, but because it is necessary to protect those express rights. *Id.*

Because the right to the effective assistance of counsel is derived from the guarantee of other Sixth Amendment rights, the protections it affords are circumscribed by the scope of those rights. The U.S. Supreme Court observed as much in its most recent opinion on the right to counsel:

> [O]ur recognition of the right to the effective assistance of counsel within the Sixth Amendment was a consequence of our perception that representation by counsel is critical to the ability of the adversarial system to produce just results . . . Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose.

United States v. Gonzalez-Lopez, No. 05-352, slip op. at 6 (June 26, 2006) (citations and quotations omitted).

Thus, the right to effective assistance of counsel is "explicitly tied to the defendant's right to a fundamentally fair trial—a trial in which the determination of guilt or innocence is 'just' and 'reliable.'" *Kimmelman v. Morrison*, 477 U.S. 365, 392–93 (1986) (Powell, J. concurring in the judgment) (quoting *Strickland*, 466 U.S. at 685–86, 696). And, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that *the trial* cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686 (emphasis added); *see also Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) ("Our decisions have emphasized that the Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.'" (quoting *Strickland*, 466 U.S. at 684)).

"Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Fretwell*, 506 U.S. at 372; *Williams v. Taylor*, 529 U.S. 362, 393 n.17

(2000). Two post-*Strickland* decisions from the U.S. Supreme Court illustrate this principle. In *Nix v. Whiteside*, the Court held that Emanuel Whiteside suffered no prejudice when his counsel's actions prevented him from presenting perjured testimony in his criminal trial. *See Nix v. Whiteside*, 475 U.S. 157, 175-76 (1986). The Court noted that the constitutional right to testify does not include the right to testify falsely and that his counsel's conduct did not, therefore, deprive Whiteside of a fair trial. *Id.*

Seven years later, the Court held that Bobby Ray Fretwell was not prejudiced by his counsel's failure to assert a sentencing error based on a case that was subsequently overruled, but was good law at the time of Fretwell's sentencing. *See Fretwell*, 506 U.S. at 371–72. The Court noted that the Sixth Amendment right to counsel only exists to protect Fretwell's right to a fair trial and that his counsel's failure to assert what was later determined to be an erroneous legal claim did not render his trial unfair. *Id.* at 369–71.

In both cases, the Court based its ruling on the premise that counsel's actions did not deprive the defendants of a fair trial, even though the outcome of the proceeding might have been different but for counsel's actions. *See id.* at 371 ("Had the trial court chosen to follow [the overruled legal claim], counsel's error would have deprived [Fretwell] of the chance to have the state court make an error in his favor." (citation and quotations omitted)); *Whiteside*, 475 U.S. at 175–76 ("Even if we

were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced."). Similarly, an error by counsel might affect the outcome of plea negotiations by causing a defendant to reject a favorable plea bargain. But a favorable plea bargain is not a substantive or procedural right nor is it necessary to a fair trial. *See Mabry v. Johnson*, 467 U.S. 504, 507 (1984) ("A plea bargain standing alone is without constitutional significance."). It is not, therefore, within the scope of those rights that guarantee of effective counsel protects.

Defendant nevertheless claims that he has the right "to effective assistance of counsel during all critical stages in the proceedings, including plea negotiations and a motion to withdraw a plea." Br. Pet. at 15. But *Knight*'s is consistent with this claim. It recognizes the right to counsel during plea negations but clarifies that the right is violated only if counsel's deficiency prejudices defendant's trial or his right to a trial. *See Fretwell*, 506 U.S. at 368 ("Our decisions have emphasized that the Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.'" (quoting *Strickland*, 466 U.S. at 684)). In other words, while a defendant has the right to counsel during plea negotiations, he is only prejudiced by counsel's error during plea negotiations if he accepts the plea bargain and waives his right to a trial, or if counsel's error reaches forward and prejudices the trial. *See Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985).

Because *Knight* is consistent with defendant's claim to effective counsel during plea negotiations, most of the cases he cites are inapposite to the real issue—whether a lost plea bargain is prejudicial under the right to effective counsel. Most of defendant's cases concern claims of uncounseled proceedings, not claims that counsel was ineffective. Br. Pet. at 14-15.[2] But, as explained, the right to counsel is an express right guaranteed by the Sixth Amendment, and when a defendant lacks counsel in a critical proceeding, prejudice is presumed. *Strickland*, 466 U.S. at 692. A claim of ineffective assistance, however, requires proof that counsel's deficiency rendered the proceeding unfair by depriving defendant of a substantive or procedural right. *Fretwell*, 506 U.S. at 372.

---

[2] Citing *United State v. Garrett*, 90 F.3d 210, 212 (7th Cir. 1996) (uncounseled motion to withdraw a guilty plea); *United States v. Veras*, 51 F.3d 1365, 1369 (7th Cir. 1995) (brief uncounseled period during which motion to suppress was pending); *United States v. Ellison*, 798 F.2d 1102, 1108-09 (7th Cir. 1986) (counsel at motion to withdraw a guilty plea had a conflict leaving Ellison "effectively without counsel"); *United States v. Crowley*, 529 F.2d 1066, 1069-71 (3rd Cir. 1976) (uncounseled motion to withdraw a guilty plea); *Garcia v. State*, 846 So.2d 660, 661 (Fla. Dist. Ct. App. 2003) (same); *Martin v. State*, 588 N.E.2d 1291, 1292-93 (Ind. Ct. App. 1992) (uncounseled motion to withdraw plea and sentencing); *Beals v. State*, 802 P.2d 2, 4 (Nev. 1990) (per curiam) (same); *Randall v. State*, 861 P.2d 314, 315-16 (Okla. Ct. Crim. App. 1993) (uncounseled motion to withdraw guilty plea); *State v. Ford*, 793 P.2d 397, 403-04 (Utah App. 1990) (uncounseled plea negotiations); *Browning v. Commonwealth*, 452 S.E.2d 360, 362-63 (Vir. Ct. App. 1994) (Browning was "effectively without counsel" at hearing on motion to withdraw guilty plea); *State v. Swindell*, 607 P.2d 852, 855-56 (Wash. 1980) (uncounseled guilty plea); *State v. Harell*, 911 P.2d 1034, 1035 (Wash. Ct. App. 1996) (uncounseled motion to withdraw guilty plea).

Defendant also cites to several federal circuits that have explicitly recognized ineffectiveness claims based on a lost plea bargain. Br. Pet. at 14-15.[3] These cases ground their holding, as defendant does, on the premise that the *Strickland* analysis "applies to claims of ineffective assistance of counsel involving counsel's advice offered during the plea process." *Magana v. Hofbauer*, 263 F.3d 542, 547 (6th Cir. 2001) (citing *Hill*, 474 U.S. at58). But, as explained, *Knight* is consistent with this premise. It merely limits reversible errors during the plea process to those errors that affect a defendant's due process rights. Moreover, disagreement by other jurisdictions does not mean this Court's holding in *Knight* was wrong.

There are at least two other states that agree with this Court's holding in *Knight*. *See State v. Monroe*, 757 So.2d 895, 897-98 (La. Ct. App. 2000), *writ denied*, 791 So.2d 109 (La. 2001); *Bryan v. State*, 134 S.W.3d 795, 802-03 (Mo. Ct. App. 2004). They recognize, as this Court implicitly did in *Knight*, that "negotiations which do not result in a guilty plea, and a resultant embodiment of that plea in the court's judgment, do not implicate any constitutionally protected rights or liberty interests." *Bryan*, 134 S.W.3d at 803. Thus, "by failing to accept a plea bargain [a defendant]

---

[3] Citing Humphress v. United States, 398 F.3d 855, 858-59 (6th Cir.), *cert. denied*, 126 S. Ct. 199 (2005); *Magana v. Hofbauer*, 263 F.3d 542, 547-48 (6th Cir. 2001); *Mask v. McGinnis*, 233 F.3d 132, 140 (2d Cir.), *cert. denied*, 534 U.S. 943 (2001); *Baker v. Barbo*, 177 F.3d 149, 154 (3d Cir. 1999); *United States v. Gordon*, 156 F.3d 376, 379-80 (2d Cir. 1998); *Paters v. United States*, 159 F.3d 1043, 1046 (7th Cir. 1998).

preserve[s] all of his constitutional rights including his only chance of being found not guilty, and [gives] up none." *Monroe*, 757 So.2d at 898.

Additionally, the federal circuit cases defendant cites rely on an erroneous interpretation of the U.S. Supreme Court's decision in *Hill v. Lockhart*. *See supra* note 3. Hill pled guilty to murder and theft. *Hill*, 474 U.S. at 53. Two years later, he sought federal habeas relief on the ground that his attorney was ineffective for misadvising him as to his parole eligibility. *Id.* The Court rejected his claim. It first held that the two-part test from *Strickland v. Washington* applied to claims of ineffectiveness in entering a guilty plea. *Id.* at 370. It noted that the prejudice inquiry required courts to determine whether "there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and would have insisted on going to trial." *Id.* It then held that Hill had not shown prejudice under *Strickland* because he had not shown that, had counsel correctly advised him, he would have rejected the plea offer and proceeded to trial. *Id.* at 60.

In applying *Strickland* to guilty pleas, the Court did not hold that any error that alters the outcome of the plea bargaining processes violates the right to the effective assistance of counsel. It held only that where counsel's deficiency induces a defendant to *accept* a guilty plea and waive his right to trial, the plea is involuntary. *Id.* at 56–57 ("Certainly our justifications for imposing the 'prejudice'

requirement in *Strickland v. Washington* are also relevant in the context of guilty pleas.").

Hill is thus consistent with prior and subsequent holdings from the Supreme Court that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (citations and quotations marks omitted); *Fretwell*, 506 U.S. at 369 (quotations omitted); *Kimmelman*477 U.S. at 393(Powell, J., concurring) (quotations omitted); *Cronic*, 466 U.S. at658. As already noted, "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Fretwell*, 506 U.S. at 372. A missed opportunity for a favorable plea bargain does not deprive defendant of a substantive or procedural right because "[a] plea bargain standing alone is without constitutional significance." *Johnson*, 467 U.S. at507. So long as a defendant's conviction is accompanied by the indicia of fairness required by due process, it complies with the Sixth Amendment, regardless of mistakes by counsel. *See Strickland*, 466 U.S. at 685 ("[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.").

C. Defendant was not prejudiced by his counsel's alleged mistake.

In the instant case, defendant admits that his counsel's alleged mistake did not deprive him of anything he is entitled to. Br. Pet. at 12 ("It is not Grueber's position that he is entitled to a plea bargain."). And he does not complain that the alleged mistake prejudiced his trial. He asserts only that the alleged mistake deprived him of a more favorable outcome. But due process does not guarantee a defendant the most favorable of all possible outcomes; it only guarantees that his conviction will result from a fair proceeding. *See Fretwell*, 506 U.S. at 370 ("The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding . . . ."). Defendant had a fair trial; he is entitled to nothing more. *See Cronic*, 466 U.S. at 656 ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted . . . the kind of testing envisioned by the Sixth Amendment has occurred.").

Thus defendant's claim fails.

II. EVEN IF DUE PROCESS INCLUDED A RIGHT TO A PLEA BARGAIN, DEFENDANT WOULD NOT HAVE ACCEPTED A PLEA BARGAIN

Non-Utah cases recognizing a right to a plea bargain have held that to show prejudice, the defendant must demonstrate that but for his counsel's erroneous

advice, he would have accepted a plea bargain. *See Magana*, 263 F.3d at 547. The United States Court of Appeals for the Seventh Circuit has added the additional requirement that defendant produce objective evidence that he would have accepted the plea bargain. *See Paters v. United States*, 159 F.3d 1043, 1046 (7th Cir. 1998). Under that requirement, the Seventh Circuit has rejected claims where the defendant's self-serving statement was the only evidence that he would have accepted the plea bargain. *See Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991).

Even if this Court adopted the reasoning of these authorities, defendant's claim would fail on the prejudice prong. In finding number 15, the trial court ruled that regardless of his trial counsel's actions, defendant would not have pled guilty:

> Based on the initial findings as set forth above, the Court further finds that the defendant suffered no prejudice from the failure of his trial counsel to request from the State copies of the recorded jailhouse conversations. Even had counsel listened to the tapes, or CD's, and discussed them with the defendant, this Court finds that the defendant would not have accepted the plea offer from the State because he did not want to plead guilty to the charge of murder.

(R.455-56).

Defendant claims, however, that the court of appeals erred when it affirmed the trial court's finding that he would not have accepted a plea and that he knew

Corcoran had not read his discovery. Br. Pet. at 18–20. Defendant's claim lacks merit.[4]

Both this Court and the court of appeals have held that following a rule 23B remand, the appellate court will "defer to the trial court's findings of fact." *See State v. Lovell*, 1999 UT 40, ¶ 22, 984 P.2d 382; *State v. Mecham*, 2000 UT App 247, ¶ 19, 9 P.3d 777. Rule 23B(g), Utah Rules of Appellate Procedure, states that "[t]he findings of fact entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals." Thus, after a rule 23B hearing, the appellate court must "defer" to the trial court's findings by reviewing them only for

---

[4] Defendant also challenges factual finding number 13. Br. Pet. at 18–19. That finding states that defendant knew that Corcoran had not read his discovery:

> 13. Because he had personal knowledge of the date he received his discovery materials as supplied by the State, and because he further knew the date Corcoran had been transferred from his cell, the defendant also knew that Corcoran had not read the discovery materials and that Corcoran could not be impeached this way.

(R. 455). Defendant's challenge is outside the scope of this court's review. On certiorari review, this court will only consider issues that are fairly included within the question presented. *See* Utah R. App. P. 49(a)(4). This court granted review to consider whether the court of appeals erred in affirming the trial court's finding that defendant would not have accepted a plea bargain even absent counsel's alleged mistakes. *See* Order of the Court, April 20, 2006, attached as Addendum B. Finding number 13 was not a basis on which the court of appeals affirmed the trial court's finding that defendant would not have accepted a plea bargain. Thus, even if finding 13 was clearly erroneous, it is irrelevant to the court of appeals' decision, and thus outside the scope of, and unnecessary to, this Court's review.

clear error. *See State v. Daniels*, 2002 UT 2, ¶ 18, 40 P.3d 611; *State v. Pena*, 869 P.2d 932, 935 (Utah 1994).

"For a reviewing court to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." *Pena*, 869 P.2d at 935–36. This Court "must sustain the trial court's judgment unless it is against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." *State v. Larsen*, 2000 UT App 106, ¶ 10, 999 P.2d 1252 (quotations and citation omitted). Moreover, it "is the province of the trier of fact to assess the credibility of witnesses, and [the appellate court] will not second guess the trial court where there is a reasonable basis to support its findings." *Cooke v. Cooke*, 2001 UT App 110, ¶ 11, 22 P.3d 1249 (quotations and citation omitted).

A. Defendant could not have accepted a plea bargain when the State disclosed the recordings because there was no bargain to accept.

As a threshold matter, defendant could not have accepted a plea bargain when the State disclosed the existence of the recordings to defense counsel because there was no plea bargain on the table. The plea offer was made at the first roll call hearing on November 13, 2001, and defendant immediately rejected it (R. 452; 458:61). The recordings were not disclosed to defense counsel until January 15,

2002, more than two months after defendant rejected the plea bargain (R. 37-38). No other plea bargains were offered or sought until defense counsel listened to the recordings at trial (R. 453; 458:65, 69).

Thus, defendant could not have accepted a plea bargain when the recordings were disclosed, because there was no bargain to accept. At most, defendant could only have asked the State to reopen its offer. But any claim that the State would have reopened the offer is speculative and cannot, therefore, support a finding of prejudice under *Strickland*. *See Strickland*, 466 U.S. at 694 (requiring defendants to show a reasonable probability of a different outcome).[5]

---

[5] Defendant claimed in the court of appeals that the State would have accepted a plea to murder up until the trial. Br. Applt. at 21-22. His claim was not supported by the record. Vince Meister, the prosecutor, testified at the rule 23B hearing only that the State would have accepted a plea, "[d]epending on the status of how the other defendants fell out" (R. 458:73). Defendant's case involved numerous co-defendants, some of whom testified against defendant (R. 229:17). Meister also agreed that when the State has a strong case, "as a matter of practice as a prosecutor, the closer you get to trial and the more preparation you put into trial, the less inclined you are to talk about plea offers" (R. 458:72). Thus, the question of whether the State would have reopened the plea offer in this case requires consideration of a variety of factors, including the prosecutor's view of the strength of the State's case, the effect the plea would have had on the prosecution of the co-defendants, and the amount of time and work the prosecutor had devoted to the case. There is no evidence in the record concerning any of these factors. Thus, defendant has not demonstrated a reasonable probability that the State would have reopened the plea offer. *See State v. Litherland*, 2000 UT 76, ¶ 16, 12 P.3d 92 (holding that defendant bears the burden of assuring that the record is adequate on appeal to determine his claim of ineffective assistance of counsel).

B. Even had there been an outstanding plea bargain, defendant would not have accepted it.

Even if there had been an outstanding plea offer, the trial court did not clearly err when it found that defendant would not have accepted it. During a remand under rule 23B, Utah Rules of Appellate Procedure, the trial court determined that defendant would not have accepted a plea offer because "he did not want to plead guilty to the charge of Murder" (R. 456). That finding is not clearly erroneous.

Steven Shapiro, one of defendant's trial attorneys, stated that defendant did not want to plead guilty as long as the plea included murder (R. 458:41). He explained that the difference in prison time between a conviction for murder and a conviction for aggravated kidnapping and murder "wasn't enough to cause [defendant] to plead guilty to something that he didn't do" (R. 458:42). Shapiro further explained that "the marginal cost . . . of the aggravated kidnapping count wasn't worth the consideration, because he would still be talking about at least 20 years" (R. 458:42). He also agreed that so long as murder was the offer, "it was fruitless to try and approach Defendant with any sort of negotiated resolution" (R. 458:45).

Additionally, Shapiro never stated that he would have told defendant to plead guilty had he known about the recordings. He only stated that it "would have altered a number of different things about the case" (R. 458:31). Shapiro

refused to "speculate now as to whether or not that might have changed [his] advice to [defendant]" (R. 458:31). David Finlayson, defendant's other trial attorney, also testified that "the murder charge would really set his ultimate sentence" and that an offer to plead to murder "was really considered a no offer" (R. 458:76).

Defendant alone testified that he would have accepted an offer had he known of the recordings (R. 458:9). However, the trial court's findings implicitly rejected defendant's self-serving testimony and accepted his attorney's testimonies (R. 455–56). *See Cooke*, 2001 UT App 110, ¶ 11 (It "is the province of the trier of fact to assess the credibility of witnesses, and [the appellate court] will not second guess the trial court where there is a reasonable basis to support its findings." (quotations and citation omitted)).

Other objective evidence supports the trial court's findings that defendant would have rejected a plea offer. Defendant told his attorneys that Corcoran may also have learned the facts of his case from a co-defendant, Larry Rassmussen (R. 458:7, 13). Defendant has not shown that this defense was not viable. So long as there exists a possible alternative defense, defendant cannot say that it is reasonably probable that he would have accepted a plea bargain to murder. *See Strickland*, 466 U.S. at 694 (requiring defendant to show "reasonable probability" of different outcome to prevail on ineffectiveness claim). This objective evidence and the testimony of defendant's trial attorneys provides an adequate basis to find that

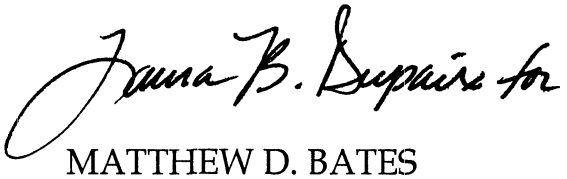
defendant would not have accepted an offer. Thus, the court of appeals correctly held that the trial court's findings were not clearly erroneous.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm the judgment of the court of appeals. But if this Court reverses the court of appeals, it should remand the case for the court to consider whether counsel was deficient.[6]

Respectfully submitted July 6, 2006.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL



MATTHEW D. BATES
Assistant Attorney General
Counsel for Respondent

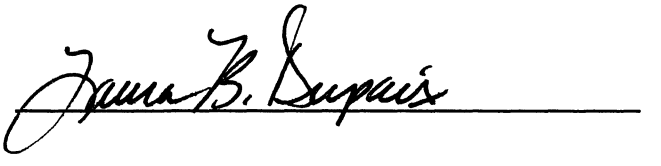
---

[6] The question of counsel's deficiency was briefed in the court of appeals. *See* Br. Applt. at 17-20; Br. Aple. at 9-18. But the court did not reach the issue because it determined that defendant had failed to establish prejudice. *See State v. Grueber*, 2005 UT App 480U. If this Court reverses the court of appeals on the questions of prejudice and the trial court's factual findings, there will remain the question of trial counsel's performance. *See Strickland*, 466 U.S. at 687 ("A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components" – deficient performance and prejudice.). Where this Court's review on certiorari leaves outstanding issues, the proper course is to remand the case for the court of appeals to consider the issues. *See State v. Maguire*, 957 P.2d 598, 600 (Utah1998) (refusing to consider issue on certiorari review that was not considered by the court of appeals and explaining that "the proper procedure is for [this Court] to reverse the court of appeals and remand this case to that court for consideration of [the outstanding issue]").

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2006, I served two copies of the foregoing Brief of Respondent upon the defendant/petitioner, Darren Neil Greuber, Jr., by causing them to be delivered by first-class mail to his counsel of record as follows:

Jennifer Gowans
Fillmore Spencer, LLC
3301 North University Ave.
Provo, Utah 84604



Addenda

Addendum A

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. Darren Neil Grueber Jr., Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20030172-CA F I L E D (November 10, 2005) 2005 UT App 480

Third District, Salt Lake Department, 011916865
The Honorable Robin W. Reese

Attorneys: Jennifer Gowans, Provo, for Appellant
Mark L. Shurtleff and Matthew D. Bates, Salt Lake City, for Appellee

---

Before Judges Billings, Greenwood, and McHugh.

GREENWOOD, Judge:

Defendant Darren Neil Grueber Jr. appeals his conviction for murder, a first degree felony, in violation of Utah Code section 76-5-203, see Utah Code Ann. § 76-5-203 (2003), and aggravated kidnapping, a first degree felony, in violation of Utah Code section 76-5-302, see id. § 76-5-302 (2003). We affirm.

Defendant first argues that his trial counsel was ineffective because counsel failed to conduct a reasonable investigation, i.e., obtaining and listening to audio tapes of Defendant's telephone conversations that undermined the defense strategy. Defendant asserts that this failure prejudiced him because it deprived him of the benefit of a plea bargain. Where a trial court rules on a defendant's ineffective assistance of counsel claim at a remand hearing pursuant to rule 23B of the Utah Rules of Appellate Procedure, see Utah R. App. P. 23B, the defendant's "ineffective assistance claim on appeal presents us with a mixed question of law and fact." State v. Classon, 935 P.2d 524, 531 (Utah Ct. App. 1997). "Accordingly, we defer to the trial court's findings of fact, but review its legal conclusions for correctness." Id.

To demonstrate ineffective assistance of counsel, as guaranteed by the Sixth Amendment, "'a defendant must show (1)

that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'" Myers v. State, 2004 UT 31,¶20, 94 P.3d 211 (quotations and citations omitted); see also Strickland v. Washington, 466 U.S. 668, 687-96 (1984). "Failure to satisfy either prong will result in our concluding that counsel's behavior was not ineffective." State v. Diaz, 2002 UT App 288,¶38, 55 P.3d 1131.

Applying these principles to the present case, we conclude that Defendant's claim fails because he suffered no prejudice. See State v. Dunn, 850 P.2d 1201, 1226 (Utah 1993) ("[W]hen confronted with a claim of ineffective assistance, we may choose not to consider the adequacy of counsel's performance if we determine that any claimed error was not harmful."). Defendant argues that he was prejudiced because, but for his trial counsel's failure to investigate and discover the defects in the defense strategy, Defendant would have accepted the plea bargain offered by the State--to drop the charge of aggravated kidnapping in exchange for Defendant pleading guilty to murder. However, Defendant "loses sight of the fact that our state and federal constitutions guarantee fair trials, not plea bargains." State v. Geary, 707 P.2d 645, 646 (Utah 1985); see, e.g., Lockhart v. Fretwell, 506 U.S. 364, 372 (1993) ("Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."). "We have previously rejected claims alleging ineffective assistance of counsel when a defendant has rejected a plea bargain and has retained his or her right to a fair trial." State v. Knight, 734 P.2d 913, 919 n.7 (Utah 1987).

These cases are dispositive. Indeed, the ineffective assistance of counsel claim rejected in Knight--"that counsel could not advise [the defendant] effectively as to the wisdom of accepting or rejecting plea bargain offers without the information that was withheld by the prosecution," id.--is similar to Defendant's claim. Defendant does not contend that he was denied his right to a fair trial but only "that he was prejudiced by his [trial] counsel['s] deficient performance during the plea bargaining process." However, because Defendant has no right to a plea bargain, see Geary, 707 P.2d at 646, he could not be prejudiced by any purported deficient performance during the plea bargaining process. Accordingly, Defendant's claim for ineffective assistance of counsel fails.

Defendant also challenges the trial court's finding that Defendant was not prejudiced by his counsel's failure to listen to the audio tapes because "[D]efendant would not have accepted the plea offer from the State because he did not want to plead

guilty to [m]urder."[1] We review a trial court's factual findings for clear error. See State v. Pena, 869 P.2d 932, 935 (Utah 1994). "For a reviewing court to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." Id. at 935-36. Also, "[i]t is the province of the trier of fact to assess the credibility of witnesses." Cooke v. Cooke, 2001 UT App 110,¶11, 22 P.3d 1249 (alteration in original) (citation and quotations omitted).

The trial court's finding is supported by the record. Although Defendant testified that he would have accepted the plea offer had he known of the recordings and their effect on his case, both of his attorneys testified that they didn't believe Defendant would accept a plea that involved murder because having the aggravated kidnapping charge dropped would have little impact on his sentence.[2] The trial court exercised its discretion in believing the attorneys' testimony instead of Defendant's testimony. This finding is not clearly erroneous. Therefore, even considering the facts of the case, Defendant suffered no prejudice from his counsel's alleged failure to investigate because he would not have accepted the guilty plea.

Accordingly, Defendant's conviction is affirmed.

_____
Pamela T. Greenwood, Judge

WE CONCUR:

_____
Judith M. Billings,
Presiding Judge

_____
Carolyn B. McHugh, Judge

---

[1]This finding bolsters our conclusion that Defendant was not prejudiced by his trial counsel's performance.

[2]For example, David Shapiro, one of Defendant's attorneys, testified that from his conversations with Defendant, he "believed that [Defendant] said he wasn't going to plead guilty to first-degree murder, and we would go to trial if that's the best they were going to offer."

Addendum B

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

The State of Utah,

Respondent,

v.

Case No. 20060009-SC
20030172-CA

Darren Neil Greuber,

Petitioner.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on January 5, 2006.

IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted only as to the following issues:

1. Whether an attorney's failure to investigate evidence that would militate in favor of accepting a plea bargain may meet the requirement of demonstrating prejudice for an allegation of ineffective assistance of counsel.

2. Whether the record adequately supports the district court's finding that Petitioner would not have accepted the State's plea offer even if his trial counsel had fully investigated the State's evidence.

A briefing schedule will issue hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

FOR THE COURT:

April 20, 2006
Date

Christine M. Durham
Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2006, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in the Interdepartmental mail service, or hand delivered to the parties listed below:

MATTHEW D BATES
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

JENNIFER GOWANS
FILLMORE SPENCER LLC
3301 N UNIVERSITY AVE
PROVO UT 84604

LISA COLLINS
COURT OF APPEALS
450 S STATE ST
PO BOX 140230
SALT LAKE CITY UT 84114-0230

THIRD DISTRICT, SALT LAKE
ATTN: SOPHIE ORVIN / JODI BAILEY
450 S STATE ST
PO BOX 1860
SALT LAKE CITY UT 84114-1860

Dated this April 20, 2006.

By Janet Alexander
Deputy Clerk

Case No. 20060009
Court of Appeals Case No. 20030172
THIRD DISTRICT, SALT LAKE Case No. 011916865

Addendum C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	FINDINGS OF FACT ON RULE 23B REMAND
Plaintiff,	:	
vs.	:	CRIMINAL NO. 011916865
DARREN NEIL GRUEBER, JR.,	:	
Defendant.	:	

This matter came before the Court at a hearing on August 24, 2004, pursuant to Rule 23B, Utah Rules of Appellate Procedure. The matter was remanded to this Court by an Order of the Utah Court of Appeals, dated April 7, 2004.

The State appeared through Matthew D. Bates and Christopher Ballard, and the defendant was present and represented by counsel, Jennifer K. Gowans. The Court, having heard the evidence offered by both parties, does hereby make the following:

FINDINGS OF FACT

1. On November 13, 2001, the State offered the defendant a plea agreement in this case which would have the defendant plead guilty to the charge of Murder, a First Degree Felony, and the State would then ask the Court to dismiss the charge of Aggravated Kidnapping.

2. This offer of settlement was conveyed by the defendant's counsel to him.

3. The defendant rejected the State's offer, because he was unwilling to plead guilty to the charge of Murder. The defendant was advised by his attorneys that the sentence for Murder would likely be 20 years in the state penitentiary. Dropping the Aggravated Kidnapping charge, the defendant felt, would only nominally benefit him, and would have little impact on his sentence.

4. The defendant believed, as did his counsel, that the defendant would prevail at trial because they felt that the State's case was weak in that it consisted mostly of the testimony of gang members and drug addicts who were subject to effective impeachment.

5. The State did not at any time renew its plea offer after it was initially rejected by the defendant, even though the defendant expressed an interest in accepting that offer after the close of the State's evidence at trial.

6. On January 11, 2002, the State served the defendant's counsel with the Fourth Supplemental Response to Request for Discovery. This document disclosed the existence of the recordings of telephone calls made by the defendant from the Davis County Jail. This Response stated that the State would make the defendant

copies of the recordings if he would provide blank compact discs or audio cassettes.

7. The defendant was aware while he was housed in the Davis County Jail that his telephone calls were subject to being recorded.

8. The defendant's trial counsel, Steven Shapiro, and David Finlayson, did not request copies of those recorded telephone conversations or listen to them before trial.

9. One of the State's witnesses at trial was a jailhouse informant, David Corcoran. Mr. Corcoran testified at trial that the defendant admitted his guilt to the Murder and Aggravated Kidnapping charges in this case.

10. The defendant and Corcoran were cellmates in the maximum security wing of the Davis County Jail from November 8, 2001 to November 19, 2001. On or about November 19, 2001, Mr. Corcoran was transferred into the general jail population and had no further contact with the defendant.

11. A part of the defendant's trial strategy was to impeach Mr. Corcoran's testimony by attempting to show that Corcoran fabricated the defendant's confession after reading police reports and other materials that the defendant had in his possession while they were cellmates. In addition, the defendant thought he could impeach Mr. Corcoran's testimony by demonstrating that Corcoran had

learned about the details of this case from a Mr. Larry Rasmussen, who was a co-defendant of this defendant. Corcoran and Rasmussen had been housed together in a holding cell at one time.

12. In some of the calls recorded after Mr. Corcoran was transferred out of the defendant's cell, the defendant stated that he had not yet received the discovery materials supplied by the State of Utah. Therefore, Corcoran could not have learned about the case details from reading those reports.

13. Because the defendant had personal knowledge of the date he received his discovery materials as supplied by the State, and because he further knew the date Corcoran had been transferred from his cell, the defendant also knew that Corcoran had not read the discovery materials and that Corcoran could not be impeached this way.

14. While it is true that Corcoran provided critical testimony against the defendant, there were eyewitnesses to the murder who identified the defendant as the perpetrator of the crimes.

15. Based on the initial findings as set forth above, the Court further finds that the defendant suffered no prejudice from the failure of his trial counsel to request from the State copies of the recorded jailhouse conversations. Even had counsel listened to the tapes, or CD's, and discussed them with the defendant, this

Court finds that the defendant would not have accepted the plea offer from the State because he did not want to plead guilty to the charge of Murder.

Dated this 14 day of September, 2004.

ROBIN W. REESE
DISTRICT COURT JUDGE

THIRD DISTRICT SALT LAKE CITY COURT STATE OF UTAH

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact on Rule 23B Remand, to the following, this 14 day of September, 2004:

Christopher D. Ballard
Matthew D. Bates
Assistant Attorneys General
Attorneys for Plaintiff
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Jennifer K. Gowans
Attorney for Defendant
3301 N. University Avenue
Provo, Utah 84604